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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 450

(Filed September 28, 1960)

POLICE COMMISSIONER OF BALTIMORE CITY
AND
STATE'S ATTORNEY FOR BALTIMORE CITY
Petitioners

v.

SIEGEL ENTERPRISES, INC., t/a SIEGEL BOOK AND MAGAZINE STORE AND CHARLES BOOK CENTER,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENT IN OPPOSITION

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OPINION BELOW

The Opinion of the Court of Appeals of Maryland in the above-entitled case appears in 223 Md. 110, 162 A. 2d 727 and is printed in Appendix B of the Petition for Certiorari, page 19.

JURISDICTION

The Petitioners have invoked the jurisdiction of this Court under 28 U.S.C., Section 1257 (3).

REASONS FOR DENYING THE WRIT

On page 3, paragraphs 3 and 4 of the Petition for Certiorari, these statements appear:

> "The Court, in finding that the statutes involved were unconstitutional, primarily based such unconstitutionality on the case of *Winters v. New York*, 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665."
>
> * * * * * *
>
> and
>
> "The Maryland Court of Appeals based their opinion primarily on the case of *Winters v. New York*, 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665. This Petition is filed to respectfully request this Honorable Court to re-examine and reconsider that decision in light of conditions as they exist today."

The Court of Appeals of Maryland, adopting in toto the brilliant opinion of the Superior Court of Baltimore City (Reuben Oppenheimer, Judge) declared unconstitutional Section 421 (a) (b) and (d) of Article 27 of the Annotated Code of Maryland (1957 Ed. and 1960 Supp.), usually referred to as the Crime Comic Books Act and hereinafter called "the Act". (The Act is set out in full in Appendix A, pages 15-17 of the Petition for Certiorari). It is true Judge Oppenheimer carefully considered the *Winters* decision and relied upon it in part. However, other reasons for holding the Act unconstitutional are stated in his opinion, some of which are distinctly non-federal and one of which derives from a decision of this Court, namely *Butler v. Michigan*, 352 U.S. 380, that has no connection with *Winters*.

REASONS OF COURT OF APPEALS, APART FROM WINTERS, FOR HOLDING ACT UNCONSTITUTIONAL.

FIRST: The Act is offensive to Articles 23 and 40 of the Declaration of Rights of Maryland, which Articles are set out in Appendix A, page 15, of the Petition for Certiorari.

SECOND: The implicit exemption as to newspapers contained in Sections 421 (a) and (b) of the Act (Appendix A, pages 15 and 16 of the Petition for Certiorari) and the explicit exemption as to newspapers contained in Section 423 of the Act (Appendix A, page 17 of the Petition for Certiorari) are offensive to the Maryland Declaration of Rights, as well as to the Equal Protection Clause of the Constitution of the United States.

THIRD: As to the definiteness required in criminal statutes, the Court of Appeals of Maryland relied upon its own prior decisions, as well as the *Winters* case.

FOURTH: There is an element present in subsection (b) of Section 421 that was not present in the *Winters* case, namely, the banning of printed matter "devoted to the publication and exploitation of sex".

Accordingly, it will be seen at a glance that, even if *Winters*, a case that was argued three times before this Court, were reconsidered and reversed, there would nonetheless exist other compelling reasons why the Petition for Certiorari in this case should be denied.

THE ACT IS OFFENSIVE TO ARTICLES 23 AND 40 OF THE DECLARATION OF RIGHTS OF MARYLAND.

As to subsections (a) and (b) of the Act, Judge Oppenheimer stated:

"Subsections (a) and (b) of Section 421 of the Maryland act, in my opinion, fall under the Supreme

> Court's condemnation of the New York statute in the *Winters* case; they fail to meet the due process requirement of *Article 23 of the Maryland Declaration of Rights* and of the Fourteenth Amendment in that they do not give fair notice of what acts will be punished, and permit within the scope of their language the punishment of acts protected by the principles of freedom of the press." (Emphasis supplied.) (Appendix B, page 30 of the Petition for Certiorari.)

Judge Oppenheimer held that subsection (d), which prohibits the display of any publications made unlawful by subsections (a) and (b) upon any public street or highway, or in any other place within the view of children below the age of eighteen, invalid in the light of *Butler v. Michigan*, supra (Appendix A, page 30, et seq. of the Petition for certiorari.) He also decided:

> "Subsection (d) violates the rights of free speech protected by *Article 40 of the Maryland Declaration of Rights* and the Fourteenth Amendment to the Federal Constitution." (Emphasis supplied.) (Appendix B, page 32 of the Petition for Certiorari.)

EXEMPTION AS TO NEWSPAPERS INFRINGES THE EQUAL PROTECTION CLAUSE.

Section 423 of the Act (Appendix A, page 17 of the Petition for Certiorari) provides:

> "This subheading shall not be construed to apply to those accounts of crime which are part of the ordinary and general dissemination of news, appearing in publications which are published not less frequently than once a week, nor to such drawings and photographs as are used to illustrate such accounts."

Apropos of this Section and the built-in exemption as to newspapers contained in Section 421, Judge Oppenheimer decided:

"The exemption of newspapers from the scope of Section 421 of the Maryland act is broader than that contained in Section 423. The latter section exempts those accounts of crime which are part of the ordinary and general dissemination of news appearing in publications published not less frequently than once a week, with illustrative drawings and photographs, but subsection (a) of Section 421, by its term applies only to publications 'principally composed of pictures,' and subsection (b) applies only to publications 'devoted to the publication' of the prohibited material. The same material can appear with impunity in newspapers, whether in the form of news accounts, comic pages or drawings, which is forbidden in other forms of publications.

"Newspapers containing such material can be purchased by minors under eighteen as easily as the publications which, to them, are prohibited. If, as the Legislature has found, children under eighteen are or may be incited to commit crimes because of the presentation in collected form of actual or fictional deeds of violent bloodshed, it is difficult to see how the incitement is less when the deeds are recounted in the daily 'comic' or other pages of newspapers. The weekly 'comics' which are a feature of the modern paper are exempt because they are only one section of the paper in which they appear, even though the child may reach only for that section, but under the act it may be a criminal offense if some or all of the material of those sections is sold separately.

"Like the Due Process Clause, the Equal Protection Clause is here to be considered in connection with a law which has a potential inhibitory effect on the freedom of the press. *Winters v. New York*, supra; *Smith v. California*, (80 S. Ct. 215, 4 L. Ed. 2d 205); *Baltimore v. A. S. Abell Co.*, (218 Md. 273). Under the Maryland act, some papers and magazines are singled out and held not entitled to the freedoms guaranteed by the Fourteenth Amendment and the *Maryland Declaration of Rights*. The test, under sub-

sections (a) and (b), is whether the publication is 'principally composed' of or is 'devoted to' the material which the Legislature has found may be injurious to persons under eighteen. The exempt publications may publish the same accounts of crime which appear in the publications subject to the act; their daily or weekly pages of 'comics' and 'adventures' may contain exactly the same strip drawings of fictional deeds of violent bloodshed which are shown in the banned 'comic books'. Indeed, the amount of the same kind of material in the daily or weekly press may be greater than that in some non-exempt publications, as long as the major portion of the paper consists of matter not within the scope of the act. Viewed in this aspect, the discrimination is not according to what is published but what is not published. (Emphasis supplied.)

"Freedom of the press is directly affected as to one class of publication but not as to another, and the classification is made, not on the basis of material deemed objectionable, but the proportion of that material to other published matter. The classification, in my opinion, is unreasonable, and violates the Equal Protection Clause of the Fourteenth Amendment." (Appendix B, pages 34-36 of Petition for Certiorari.)

A denial of equal protection transgresses not only the Fourteenth Amendment, but also Article 23 of the Maryland Declaration of Rights. *Sports Daily v. Public Service Commission*, 179 Md. 355, 358, 18 A. 2d 210; *Celanese Corporation v. Davis*, 186 Md. 463, 47 A. 2d 379.

Court of Appeals of Mary and Relied Upon Its Own Prior Decisions as to Definiteness Required in Criminal Statutes.

The Court of Appeals in its epilogue to Judge Oppenheimer's opinion based its decision as to the indefiniteness of the Act upon its own prior decisions, saying:

"We will note in closing that this Court has recognized and applied the rule in regard to the definite-

ness required in criminal statutes, as laid down by the Supreme Court of the United States. Among the cases doing so, see *State v. Magaha*, 182 Md. 122, 125; *Blum, et al. v. Engelman*, 190 Md. 109, 113; *McGowan, et al. v. State*, 220 Md. 117, 125." (Appendix B, page 38 of Petition for Certiorari.)

BANNING OF PRINTED MATTER "DEVOTED TO THE PUBLICATION AND EXPLOITATION OF SEX". (SUBSECTION (b) OF SECTION 421.)

This element was not present in the statute involved in *Winters*. Judge Oppenheimer held:

> "The defendants contend further that subsection (b) of Section 421 differs from the New York statute because, in addition to other publications, it includes those devoted to the publication and exploitation of sex. Here again, the same indefinite standard applies. Moreover, as the Supreme Court points out in *Roth v. United States*, supra, (354 U.S. 476), sex and obscenity are not synonymous. The term 'publication and exploitation of sex' injects another element of indefiniteness in an area in which freedom of speech and of the press are at stake. See Lockhart and McClure, 'Literature, the Law of Obscenity, and the Constitution', 38 Minn. L. Rev. 295." (Appendix B, pages 28 and 29 of the Petition for Certiorari.)

It might be observed that in neither of two out-of-state cases that Judge Oppenheimer referred to in holding the Maryland act unconstitutional, namely *Adams v. Hinkle*, 51 Wash. 2d 878, 322 P. 2d 844 and *Katzev v. County of Los Angeles*, 341 P. 2d 310, both of which banned crime comic books, and both of which were held unconstitutional, was a petition for certiorari filed in this Court. Probably because both cases had non-federal as well as federal bases.

MISCELLANEOUS

It is, of course, not contended by the Respondent that obscenity is entitled to constitutional protection. *Roth v. U.S.*, supra. The Act involved here is not an obscenity statute.

It will be observed that both subsection (a) and subsection (b) of Section 421 prohibit not only the selling of the banned material to children under eighteen, but also permitting "the perusal of by any such child" the banned material. This constitutes a subtle infringement of the rights guaranteed by the First Amendment and carried over by the Fourteenth Amendment against state action, in that a bookseller could have on his tables and shelves only books appropriate for children under eighteen. *Butler v. Michigan*, supra.

CONCLUSION

The *Winters* case has been law for twelve years. There would seem to be no reason for departing from that decision. However, as has been pointed out in this Brief in Opposition, the opinion of the Court of Appeals of Maryland in this case is based upon many considerations other than the *Winters* case. The invalidity of subsection (d) is predicated upon *Butler*, not *Winters*. No newspaper exemption was involved in *Winters*. The Court of Appeals found that the Act is inimical to the Maryland Declaration of Rights, as well as the Constitution of the United States.

This Court has consistently taken the position that it will not entertain jurisdiction of cases of this type if there was sufficient state ground for the decisions. *Black v. Cutter Laboratories*, 351 U.S. 292; *Wolfe v. North Carolina*, 4 L. Ed. 2d 1650, 80 S. Ct. 1482.

The Petition for Certiorari should be denied.

Respectfully submitted.

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